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NO. 41677-8-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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IN RE: WASHINGTON BUILDERS BENEFIT TRUST,  
  
RE SOURCES FOR SUSTAINABLE COMMUNITIES, A-1  
BUILDERS, SF MCKINNON COMPANY INC., CABINETWORKS,  
LIVING SPACE,

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, et al.,

Respondents/Cross-Appellants.

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REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS  
BIAW, BIAW-MSA, WBBT AND INDIVIDUAL WBBT TRUSTEES

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## TABLE OF CONTENTS

	<u>Page</u>
A. The Enrollment Agreements Are Not Trust Documents ....	6
1. The Enrollment Agreements Refer to a Pre-Existing Trust, They Do Not Create a New Trust ..	6
2. The Enrollment Agreements Cannot Govern the Duties of Trustees Who Have Not Manifested Consent to Serve as Trustees Under the Enrollment Agreement.....	8
3. BIAW Is the Settlor of the Trust, which Was Created by BIAW with BIAW's Property .....	10
B. The Court Erred in Determining that MSC's Retention of Interest Earned Before Funds Are Deposited in WBBT Is a Breach of Trust .....	13
C. The Trial Court Erred in Determining that MSC's Retention of Outbound Interest Is a Breach of Trust.....	14
1. MSC's Retention of Disbursement Float Interest Is Permissible and Is a Usual and Customary Practice.....	14
2. Float Interest Is a Natural Consequence of the Reasonable Distribution System to which Plaintiffs Consented .....	15
3. Retention of Interest by MSC Is Also Permissible Because the Declaration of Trust and the Enrollment Agreements Expressly Authorize WBBT to Reimburse MSC for its Costs and to Pay for Administrative Support .....	16
4. The Amounts at Issue Are De Minimis and Do Not Give Rise to Fault .....	18
5. Plaintiffs Cannot Overcome the De Minimis Rule by Seeking Relief on Behalf of Others.....	20

D.	State Defendants Acted in Good Faith and Are Entitled to the Protections of the Exculpatory Provisions.....	23
E.	The Trial Court Erred in Failing to Distinguish the Different Roles of the State Defendants when Assigning Liability.....	24
F.	The Trial Court Erred in Failing to Award State Defendants their Attorneys' Fees and Costs.....	25

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Allard v. Pac. Nat'l Bank</i> , 99 Wn.2d 394, 663 P.2d 104 (1983).....	21, 22
<i>Anderson v. Mt. Clemens Pottery Co.</i> , 328 U.S. 680 (1946).....	19
<i>Baldus v. Bank of Cal.</i> , 12 Wn. App. 621, 530 P.2d 1350 (1975).....	16
<i>Bay Area Props., Inc. v. Dutch Hous., Inc.</i> , 347 F. Supp. 2d 619 (E.D. Wis. 2004).....	19
<i>Bd. of Trs. v. Mayor &amp; City Council</i> , 562 A.2d 720 (Md. 1989) .....	19
<i>Bryan v. Sec. Trust Co.</i> , 176 S.W.2d 104 (Ky. Ct. App. 1943) .....	19
<i>Carstens Packing Co v. Cox</i> , 47 Wn.2d 346, 287 P. 2d 486 (1955).....	4
<i>Crews v. Overbey</i> , 645 S.W.2d 388 (Tenn. 1983).....	14
<i>Dolezal v. Plastic &amp; Reconstructive Surgery</i> , 640 N.E.2d 1359 (Ill. App. Ct. 1994) .....	20
<i>Druskin v. Answerthink, Inc.</i> , 299 F. Supp. 2d 1307 (S.D. Fla. 2004) .....	19
<i>Estate of Taylor</i> , 85 Cal. Rptr. 474 (Cal. Ct. App. 1970).....	18
<i>Finkelstein v. Finkelstein</i> , 502 A.2d 350 (R.I. 1985).....	20, 21

<i>First Citizens Fed. Sav. &amp; Loan Ass'n v. Worthen Bank &amp; Trust Co.</i> , 919 F.2d 510 (9th Cir. 1990) .....	7
<i>G.M. Sign, Inc. v. Stergo</i> , 681 F. Supp. 2d 929 (N.D. Ill. 2009) .....	19
<i>Gibson v. Resolution Trust Corp.</i> , 750 F. Supp. 1565 (S.D. Fla. 1990) .....	7
<i>Hoffman v. Tieton View Cmty. Methodist Episcopal Church</i> , 33 Wn.2d 716, 207 P.2d 699 (1949) .....	8
<i>In re Ambanc Le Mesa Ltd. P'ship</i> , 115 F.3d 650 (9th Cir. 1997) .....	19
<i>In re Guasti's Estate</i> , 256 P.2d 629 (Cal. Ct. App. 1953) .....	19
<i>In re Madsen's Estate</i> , 48 Wn.2d 675, 296 P.2d 518 (1956) .....	8
<i>In re Marriage of Alexander</i> , 857 N.E.2d 766 (Ill. App. 2006) .....	19
<i>In re Morgan Guar. Trust Co.</i> , 396 N.Y.S.2d 781 (Sur. Ct. 1977) .....	19
<i>In re Trusts Created under the Will of Dwan</i> , 371 N.W.2d 641 (Minn. Ct. App. 1985) .....	18
<i>Kelly v. Foster</i> , 62 Wn. App. 150, 813 P.2d 598 (1991) .....	21, 22
<i>Laughlin v. March</i> , 19 Wn.2d 874, 145 P.2d 549 (1944) .....	7, 8
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002) .....	4
<i>Mercer v. Merchants Nat'l Bank</i> , 298 A.2d 736 (N.H. 1972) .....	18

<i>Nat'l Bank of Wash. v. Equity Investors</i> , 81 Wn.2d 886, 506 P.2d 20 (1973).....	16
<i>Old Nat'l Bank &amp; Trust Co. v. Hughes</i> , 16 Wn.2d 584, 134 P.2d 63 (1943).....	10
<i>Sarah v. Primarily Primates, Inc.</i> , 255 S.W.3d 132 (Tex. App. 2008).....	7
<i>Sherwood B. Korssjoen, Inc. v. Heiman</i> , 52 Wn. App. 843, 765 P.2d 301 (1988).....	20
<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency</i> , 535 U.S. 302 (2002).....	12
<i>TRW Vehicle Safety Sys., Inc. v. Santiso</i> , 980 So. 2d 1149 (Fla. App. 2008).....	19
<i>Tyler Pipe Indus., Inc. v. Dep't of Revenue</i> , 96 Wn.2d 785, 638 P.2d 1213 (1982).....	4
<i>Van de Kamp v. Bank of Am.</i> , 251 Cal. Rptr. 530 (Cal. Ct. App. 1988).....	15
<i>Weber v. Jefferson Cnty.</i> , 166 P.2d 476 (Or. 1946) .....	19
<b>STATUTES</b>	
RCW 11.97.010 .....	23
RCW 11.98.070(27).....	18
RCW 11.104A.070(b).....	13
RCW 51.18 <i>et seq.</i> .....	11
<b>RULES AND REGULATIONS</b>	
CR 23 .....	22
DEP'T OF LABOR AND INDUS., WSR 10-21-086 (PERMANENT RULES) at 1 (Oct. 19, 2010) .....	11

WAC 296-17-9042.....	11
WAC 296-17-90428.....	11
WAC 296-17-90445 (2010).....	12
WAC 296-17-90445.....	11, 12
WAC 296-17-90455.....	13
WAC 296-17-90490.....	13
WAC 296-17B-200.....	11
WAC 296-17B-200 (2010) .....	11, 13

#### **OTHER AUTHORITIES**

2 AUSTIN SCOTT <i>ET AL.</i> , SCOTT & ASCHER ON TRUSTS § 10.10 (5th ed.) .....	14
4 AUSTIN SCOTT <i>ET AL.</i> , SCOTT & ASCHER ON TRUSTS § 24.2.1 (5th ed.) .....	22
GEORGE G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 150 (Rev. 2d ed. 1984) .....	8, 9
RESTATEMENT (THIRD) OF TRUSTS § 35, cmt. a (2003) .....	8

In the words of Plaintiffs' counsel at trial, BIAW offers "the best retro program in the state." RP 9/15 115:16-25. BIAW Member Services Corporation ("MSC") and the Washington Builders Benefit Trust ("WBBT") are important components of the success of that program. Since MSC was founded, the retro program has flourished. Workers are safer, small businesses are receiving refunds they would not otherwise receive, and the participants' trade association is earning revenue that it uses to provide valuable services to its members. RP 9/15 53:3-54:20. Even Plaintiffs testified that the programs BIAW funds for its members with this revenue are valuable to their business. CP 8562. After investigating competitive retro programs, Plaintiffs concluded BIAW's retro program "was the best program."<sup>1</sup>

Despite the consensus about the value of BIAW's retro program and the services it funds for its members, five Plaintiffs pursued claims in this lawsuit that would destroy the program. More than 10,000 participants received notice of this lawsuit and a summons inviting them to join, but only five chose to pursue claims. They are not class representatives. They do not represent others. In fact, eight participants joined the lawsuit to oppose the relief being sought by the five Plaintiffs. Yet those five Plaintiffs – whose entire claims in this lawsuit could be addressed by \$350 – contend that they are entitled to relief on behalf of

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<sup>1</sup> CP 8502 (Mr. Dubrow is the owner of Plaintiff A-1 Builders and an officer of Plaintiff RE Sources for Sustainable Communities).

thousands of others who have rejected Plaintiffs' request to join them in pursuing claims.<sup>2</sup>

That is the backdrop against which the court exercised its equitable powers. Context mattered. The success of the retro program; the unique nature of the trust; the relationship of BIAW, MSC, and WBBT; and that only a tiny fraction of participants wanted to run the program differently (and that more participants disagreed with Plaintiffs) mattered. The court recognized these considerations, understood that there is no precedent addressing a similar trust, and found its way to the generally right, equitable result. The court made errors, however, along the way in defining the scope of the trust and failing to go far enough in recognizing the significance of the unique relationship of the parties. If the court fully considered the relationships, it would not have found any technical breaches.

BIAW, MSC, and WBBT all have the same mission: serving members of the association. Primarily for tax purposes, they perform distinct roles, but there is no question that they are intended to work together and share a common purpose. BIAW is a voluntary, non-profit trade association made up primarily of small businesses. They are homebuilders and those involved in the building industry who have banded together for common purposes and formed a membership

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<sup>2</sup> In contrast to their claims for only \$346.68, during the five years in question, Plaintiffs received \$116,527.29 in refunds as a result of their participation in BIAW's retro program. Ex. 1485 at 5-6 & Exhibit 2 thereto at Tabs 1-5.

organization that the members run for the members. It is democratically governed with officers and directors elected through the membership ranks. The governing board has more than 250 members. *E.g.*, RP 9/15 35:6-41:7; CP 8801-02.

The trade association offers services to its members through Member Services Corporation, an aptly named entity. The services include education programs, legal support, safety programs, professional skills training, accounting, and other support designed to provide small builders with the resources to compete with large builders. That is the reason for the association and it is what gets the staff up in the morning. RP 9/15 54:6-20. These programs have been invaluable to members, including Plaintiffs and other retro participants. CP 8538.

BIAW, the nonprofit association, is the sole shareholder in Member Services Corporation. BIAW created the trust, WBBT, to serve as an important component of one of the services offered to BIAW's members – the retro program. The trustees are seven individuals appointed by the president of BIAW from among BIAW's general membership. App. 5 (Ex. 2227) at 4 ¶ 3.<sup>3</sup> A relationship among BIAW, MSC, and the trust is intended. They are expressly intended to deal with one another. The trustees come from within BIAW because they understand what is important to fellow members. And their goal, like

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<sup>3</sup> Cites in this brief to “App. 4” and “App. 5” refer to the Declaration of Trust and enrollment agreement, which appear as Appendices 4 and 5, respectively, to State Defendants’ opening brief. *See also* Brief of Respondents at 10 n.5.

Member Services Corporation and like BIAW, is to serve the members. Serving that common goal is not self-dealing, as Plaintiffs claim. It is exactly what each entity was created and intended to do by BIAW's membership. The testimony on this subject was without contradiction. *E.g.*, RP 9/14 19:22-20:30, 80:18-23, 120:13-121:2.

A court sitting in equity must consider this complete picture, not snippets taken out of context. *See Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792 (1982) (When a court sits in equity, it must examine all factors "in the light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public."); *Carstens Packing Co v. Cox*, 47 Wn.2d 346 (1955) ("When equity assumes jurisdiction over the subject matter of an action ... it will retain jurisdiction for all purposes and grant whatever relief the facts warrant."); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460 (2002) ("Equity includes the power to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances."). The complete picture reflected in the record shows organizations and trustees who are honest, dutiful, and committed to the members of their association. By effectively performing their respective roles, they built the best retro program in the state.

The trustees – all of whom volunteer their time in the service of the membership without compensation – made discretionary decisions providing substantial benefit to the members. CP 8281-82; CP 8287-88;

RP 9/15 59:18-60:2; RP 9/14 119:4-8; FF 3, 40, 42. The trustees were not obligated to make these discretionary decisions, but by doing so they generated almost \$5 million in extra investment earnings to participants in the program (not to BIAW or MSC) during the years in question.<sup>4</sup>

Similarly, the uniform evidence at trial showed dedicated Member Services Corporation staff who not only administer the retro program but provide support without charge to WBBT. That support includes staffing and coordinating meetings, calculating and distributing more than 6,000 retro refund checks each year, fielding questions and calls from participants, carrying out directions for investments, and a myriad of activities benefiting the members. *E.g.*, RP 9/15 45:25-46:22; RP 9/15 115:6-116:12, 118:24-121:8, 125:19-128:17, 131:7-133:1; CP 8289.

The court erred in not giving full consideration to the relationships and efforts of the State Defendants. BIAW created the trust at issue and established its terms as part of BIAW's plan for sponsoring the retro program. The trust took what BIAW contributed, grew it with effective investments, and distributed it to BIAW's participating members. This process generated revenue for the Association, too. Some of that revenue came from enrollment fees, some from Marketing Assistance Fees, and a de minimis amount came from interest earned on float. All of those

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<sup>4</sup> Exs. 214, 817, 826, 844, and 1151 (refund distribution summaries, including "WBBT Investment Gain" line item); *see also* CP 8302-03 (description by WBBT's Independent Financial Advisor, William Stordhal, of investment gains and sound investment policy); FF 39, 40 (investment earnings on MAF not distributed to MSC and local associations).

revenues were used to provide benefits *to members*, including Plaintiffs and other WBBT beneficiaries.

With that context, and based on the governing law, the court erred in determining: the enrollment agreements (as opposed to the Declaration of Trust) created and govern WBBT; MSC's retention of float interest was a technical breach of trust; exculpatory provisions designed to protect those acting in good faith did not apply; the conduct of one State Defendant was attributable to all; and some or all of State Defendants were not entitled to their attorneys' fees. On those decisions, the court should be reversed.

**A. The Enrollment Agreements Are Not Trust Documents**

**1. The Enrollment Agreements Refer to a Pre-Existing Trust, They Do Not Create a New Trust**

Plaintiffs contend and the trial court concluded that the enrollment agreements *create* a trust and they imply that BIAW and MSC are trustees under the enrollment agreements. Pls.' Reply/Cross Br. 41-43. To the contrary, the plain language of the enrollment agreements demonstrate that the parties were fully aware of and intended to use a *separate, specifically identified, pre-existing trust* – WBBT – to receive and hold retro refunds. Each enrollment agreement explicitly outlines WBBT's role, and also identifies the WBBT Trustees:

*The "Washington Builders Benefits Trust" (hereinafter "the Trust")* will receive, on behalf of Participants, all Premium Returns paid by DLI pursuant to this Agreement, and hold some or all of such Premium Return until the expiration of the period DLI

may adjust such Premium Return or claim Penalties with respect to the Coverage Period. ***The Trust is comprised of seven trustees appointed by the president of BIAW from among the BIAW general membership.*** All actions and decisions by the Trust regarding the disposition of the Premium Returns, including establishing reserves, investment of funds, the timing and amount of distributions or payments to Participants, and expenditures from the Trust for administrative costs and expenses of the Plan shall be within the sole discretion of the Trust.

App. 5 (Ex. 2227) at 4 ¶ 3 (emphasis added). Having explicitly defined “the Trust” as WBBT (which already existed), the enrollment agreement then states that “[a]ny Premium Returns payable to BIAW by DLI under the DLI Agreement shall be held in trust ***by the Trust*** for Participants including the Member and shall be subject to the exclusive management and control of the Trust.” *Id.* at 5 ¶ 6 (emphasis added).

The parties’ intention is clear: BIAW and its subsidiary MSC were to administer the retro program (and have a contractual obligation to do so), and WBBT was to hold retro refunds in trust. There is nothing in the enrollment agreements manifesting intent to create some other trust (of which BIAW and MSC are trustees), and it would be illogical to read the agreements that way given the language quoted above.

To create a new trust, there must be a clear intent to do so. *See Laughlin v. March*, 19 Wn.2d 874, 879 (1944) (valid trust requires an “intention to create the trust”) (applying California law).<sup>5</sup> As the

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<sup>5</sup> See also e.g., *First Citizens Fed. Sav. & Loan Ass’n v. Worthen Bank & Trust Co.*, 919 F.2d 510, 513-14 (9th Cir. 1990) (loan participation agreement in which bank agreed to hold funds did not create a trust; “fiduciary relationships should not be inferred absent unequivocal contractual language”); *Gibson v. Resolution Trust Corp.*, 750 F. Supp. 1565, 1571-72 (S.D. Fla. 1990) (agreement in which savings and loan association agreed to pay legal fees and damages did not give rise to trust obligations because its language

Washington Supreme Court has explained, “[b]efore a trust will be found to exist, there must be a clear manifestation thereof.” *Hoffman v. Tieton View Cmty. Methodist Episcopal Church*, 33 Wn.2d 716, 726 (1949); accord *In re Madsen’s Estate*, 48 Wn.2d 675, 678 (1956) (“To constitute a trust, there must be an explicit declaration of trust or circumstances which show **beyond doubt** that a trust was intended to be created.”) (emphasis added). The parties must express “an intention to create a trust and not to do something else,” such as enter into a contractual agreement. *Hoffman*, 33 Wn.2d at 726. Here, it is plain that the parties intended, by the enrollment agreements, to create only contractual relationships between BIAW and the retro participants. The only trust contemplated by the enrollment agreements is WBBT, and the only trustees identified by the agreement are the WBBT trustees.

**2. The Enrollment Agreements Cannot Govern the Duties of Trustees Who Have Not Manifested Consent to Serve as Trustees Under the Enrollment Agreement**

There is no evidence in the record that any State Defendant agreed to serve as trustee of any trust created by the enrollment agreements and “[a] trustee who has not accepted the office cannot be compelled to act as trustee.” RESTATEMENT (THIRD) OF TRUSTS § 35, cmt. a (2003). A valid trust requires “acceptance of the trust by the trustee.” *Laughlin*, 19 Wn.2d

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did not clearly express the intent to create a trust); *Sarah v. Primarily Primates, Inc.*, 255 S.W.3d 132, 146 (Tex. App. 2008) (contract in which university agreed to transfer funds for the benefit of primates did not create a trust because there was “no clear intent” to do so). Here, the enrollment agreements are similarly contracts and do not evidence any intention to create a trust.

at 879 (1944); GEORGE G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 150, at 88 (Rev. 2d ed. 1984) [hereinafter “BOGERT”] (“Since the trust involves a relation requiring high good faith and much responsibility, it seems of doubtful expediency to indulge in presumptions of acceptance where there is no affirmative action by the trustee.”).

Neither BIAW nor MSC has agreed to serve in a trustee capacity of any trust. The enrollment agreements merely authorize BIAW to receive from the state retro refunds as the plan sponsor and deliver them to the *specific, named trust*, WBBT. Likewise, the WBBT trustees did not consent to serve as trustees of any trust other than WBBT. *See, e.g.*, CP 2610 at ¶ 6 (Declaration of WBBT trustee, Cathy Sanders; “The only trust I consented to serve as a trustee of is the trust created by and governed by the 1994 Declaration of Trust.”); CP 2616; CP 2620-21. Neither WBBT nor its trustees are parties to the enrollment agreements, and they did not participate in drafting those agreements. CP 8282; CP 1924 at 166:18 – 167:14; CP 1973 at 127:20 – 128:2; App. 5 (Ex. 2227) at 4 (preamble); CP 9070-71 at 99:20 – 100:16.<sup>6</sup> In contrast, the WBBT trustees expressly agreed to serve as trustees under the 1994 WBBT Declaration of Trust. *E.g.*, Ex. 2027 at 10; CP 8282; RP 9/14 18:9-19.

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<sup>6</sup> Plaintiffs argue, without citation to any authority, that because WBBT’s trustees were aware of the enrollment agreements, they consented to serve as trustees under them. That is not the law, however. A trustee must manifest acceptance of trust duties to be bound. BOGERT § 150, at 78, 88 (“No one can be compelled to undertake the burdens of trusteeship against his desire.”).

### 3. **BIAW Is the Settlor of the Trust, which Was Created by BIAW with BIAW's Property**

The court entered findings of fact (which are not challenged on appeal) making clear that WBBT was established by BIAW and that BIAW defined WBBT's purpose.<sup>7</sup> Those findings are inconsistent, however, with the court's summary judgment determination that the thousands of individual retro participants were the settlors or creators of the trust.<sup>8</sup> The summary judgment decision was in error and was the foundation for the court's erroneous determination that the enrollment agreements were trust instruments.<sup>9, 10</sup>

The court explained its summary judgment analysis as follows:

A "trust instrument" is a document in which the settlor transfers equitable title in the property to the trust beneficiary and transfers a property interest to the trustee. BOGERT, GEORGE G., ET AL., BOGERT'S TRUSTS AND TRUSTEES § 147. A "settlor" (i.e. trustor) is the person who has legal competence to make a disposition of the legal title to the property, such as the property's owner.

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<sup>7</sup> See, e.g., FF 12 ("BIAW and others created the original Washington Builders Benefit Trust."); FF 13 ("BIAW established WBBT to hold and invest refunds . . . BIAW chose to establish the trust as the method of holding the funds it received from the Department of Labor and Industries."); and FF 18 ("The BIAW had a choice about how to structure its retro program . . . BIAW chose to use a trust and to allocate responsibilities among BIAW, BIAW-MSC, and WBBT in this manner partially to reduce taxes and liability.").

<sup>8</sup> CP 5007 ("Under both the L&I regulations and the parties' understanding, the employers own these refunds, subject to the enrollment agreements, and therefore, the employers are the settlors.").

<sup>9</sup> CP 5006 ("The primary issue in dispute here is which parties are the settlors, because resolution of that issue will determine whether the enrollment agreement is the trust instrument.").

<sup>10</sup> The identity of the settlor or creator of the trust is also important because "the sole object of the courts is to ascertain the intent and purpose of the settlor, and to effectuate that purpose insofar as it be consistent with the rule of law." *Old Nat'l Bank & Trust Co. v. Hughes*, 16 Wn.2d 584, 587 (1943) (internal quotation omitted).

RESTATEMENT (SECOND) OF TRUSTS § 3; AM. JUR. 2D  
TRUSTS § 49.

CP 5006.

The court determined that participants own the refunds DLI pays to BIAW and contributes that property to create a trust when signing the enrollment agreements. CP 5007.

The court's reasoning is largely based on its erroneous interpretation of DLI regulations. *Id.* Since the court's decision, however, DLI clarified its regulations, which now expressly state that the "refund is the property of the group sponsor." WAC 296-17B-200 (2010). BIAW then contributed its property to WBBT. BIAW is, therefore, the settlor and there is no basis for the determination that participants contributed their property to form a trust under the enrollment agreements.

Contrary to Plaintiffs' arguments, the law did not change since summary judgment or trial. The governing statute remains the same. The implementing regulations were simply "rewritten to better conform to the statute, chapter 51.18 RCW, and to improve the overall order and clarity." DEP'T OF LABOR AND INDUS., WSR 10-21-086 (PERMANENT RULES) at 1 (Oct. 19, 2010). They made clear what was already true: BIAW owns the refunds and transfers its property to the trust.<sup>11</sup>

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<sup>11</sup> Compare current WAC 296-17B-200 ("[T]he refund is property of the group sponsor.") with former WAC 296-17-90445 ("If you [defined as "sponsoring organization of a retro group"] ... are entitled to a refund...."). Under RCW 51.18.020-040 and former WAC 296-17-9042, only BIAW qualifies as a sponsoring organization entitled to contract with DLI to receive refunds. Under former WAC 296-17-90445, "[a]ll retro group refunds are paid directly to the sponsoring organization." DLI holds the sponsor (not individual participants) responsible for any additional assessments. WAC 296-17-90428; WAC 296-17-90445.

The clarified regulation is consistent with the nature of a group retro program. The **group** earns a refund based on the **group's** overall performance, not based on any individual participant's performance. Similarly, if a sponsoring organization sponsors multiple retro groups, one of which earns a refund and the other owes additional premiums, DLI can deduct the additional premium owed by one group from the refund due to the other group. WAC 296-17-90445.<sup>12</sup> Only BIAW is entitled to enter into agreements with DLI. DLI's payments are made payable to BIAW in a lump sum and not with any instruction as to whether any particular participant should receive a refund. Participants have no individual interest in the refund.

Plaintiffs argue that if BIAW owns the refunds then BIAW could have "pocketed the money" rather than "distribute any refund to the group members" under WAC 296-17-90445 (2010). Pls.' Reply/Cross Br. 43. That is wrong. BIAW has **contractual** obligations regarding distribution of the refund, which are set forth in the enrollment agreements. App. 5 (Ex. 2227) at 4-5 ¶¶ 4-6. Furthermore, BIAW has not "pocketed the money." It has refunded more than \$139,988,780 to participants (Ex. 1485 at 7), including more than \$116,257 to the five Plaintiffs. Ex. 1485 at Exhibit 2 thereto at Tabs 1-5.

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<sup>12</sup> If the court were correct that participants had some ownership interest in the DLI refunds, this shifting by DLI would be an unconstitutional taking of their property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002). Plainly, Washington courts avoid construing the rights of the parties in a manner which renders the regulations unconstitutional.

**B. The Court Erred in Determining that MSC's Retention of Interest Earned Before Funds Are Deposited in WBBT Is a Breach of Trust**

The court erred in determining that DLI's payments to BIAW were trust funds before they were transferred to WBBT. Under Washington law, DLI must distribute retro refunds "directly to the sponsoring organization," and thus cannot transfer those funds directly to WBBT or any other trust.<sup>13</sup> WAC 296-17-90455 (former); CP 1588 ¶ 12; CP 2035 ¶ 4. The "refund is the property of the group sponsor," BIAW. WAC 296-17B-200 (2010). The DLI refunds received by BIAW are not subject to trust duties; they are subject to contractual duties. The regulatory structure contemplates that the relationship between the sponsoring organizations and their participants will be governed by contracts in which the State has no interest. WAC 296-17-90490 (former) (DLI "disclaims any interest in any *contracts* executed between a sponsoring organization and their participating group members") (emphasis added). The enrollment agreements make clear that "[a]ll retrospective premium adjustments that may be earned by the employer will be *given to the Association*." App. 5 (Ex. 2227) at 3 (BIAW-035450) (emphasis added). That is exactly what occurred.

Under Washington law, the DLI adjustments do not become trust funds until MSC transfers them to WBBT. RCW 11.104A.070(b); *see*

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<sup>13</sup> Plaintiffs argue that BIAW determined the structure of the retro program and allocation of duties among and between the State Defendants, but they cannot dispute that Washington law requires that the initial payment from DLI be made to the sponsoring organization and not to WBBT or any other trust.

*also Crews v. Overbey*, 645 S.W.2d 388, 390 (Tenn. 1983) (“[A] declaration of trust in property to be acquired in the future does not create a present trust . . . .”); 2 AUSTIN SCOTT *ET AL.*, SCOTT & ASCHER ON TRUSTS § 10.10 (5th ed.) (“It is obvious that one cannot create a trust of property in which one has no interest. The mere fact that one hopes or expects to acquire property in the future is not an interest in property.”) CP 1163-64 ¶ 10. Accordingly, the court erred in determining that MSC’s retention of inbound interest on funds that are not yet trust funds is a breach of trust. CP 5011.

**C. The Trial Court Erred in Determining that MSC’s Retention of Outbound Interest Is a Breach of Trust**

MSC’s retention of outbound (or disbursement) interest is a permissible, usual and customary practice; it is the result of a reasonable system for distributing refunds that is well within State Defendants’ discretion; and de minimis amounts do not establish liability.

**1. MSC’s Retention of Disbursement Float Interest Is Permissible and Is a Usual and Customary Practice**

Plaintiffs agreed every year they participated that “[t]he distribution to or collection from the individual group members will be done by the Association” and that BIAW may assign that responsibility to MSC. App. 5 (Ex. 2227) at 3 (BIAW-035450). MSC must have funds on hand to cover the participant checks. MSC’s retention of interest on the “disbursement float” – *i.e.*, funds remaining in a bank account after checks

are issued and before participants present those checks for payment – is not a breach of trust.

“A trustee is allowed to keep on hand cash necessary to pay upcoming expenses of the trust,” and “[t]he trustee need not pay interest on such funds.” *Van de Kamp v. Bank of Am.*, 251 Cal. Rptr. 530, 546 (Cal. Ct. App. 1988) (trustees did not breach fiduciary duties by keeping interest earned between time it issued checks and time beneficiaries cashed those checks). Once the refund check is issued to a participant, the amount is fixed. MSC need not pay interest that accrues while waiting for participants to cash their checks.

## **2. Float Interest Is a Natural Consequence of the Reasonable Distribution System to which Plaintiffs Consented**

Plaintiffs argue that State Defendants “cannot blame their own choices in structuring the trust for their breaches of fiduciary duties” (Pls.’ Reply/Cross Br. 21), but Plaintiffs consented to the structure that creates the float interest.

Plaintiffs signed enrollment agreements in which they agreed that “[t]he distribution to or collection from the individual group members will be done by the Association.” Recognizing that the funds must first come from WBBT to the Association for distribution, Plaintiffs also agreed that “[t]he timing and amount of any distribution of all or any part of the Premium Return and any earnings on such Premium Return shall be determined by the Trust in its *sole and absolute discretion, based upon such reasonable distribution system as may now or hereafter be adopted*

*by the Trust.*”<sup>14</sup> App. 5 (Ex. 2227) at 5 ¶ 6. Plaintiffs also agreed that the trustees’ decisions on such matters “*shall not be subject to challenge* or modification by the Member or any other Participants ....” *Id.*

Having entered into such an agreement, Plaintiffs cannot now challenge the reasonable system that BIAW’s retro program has operated successfully for more than 15 years. *E.g., Nat’l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912–13 (1973) (“The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.”).

Plaintiffs argue that other systems could have been adopted that would be better. Evidence presented to the trial court demonstrates they are wrong. It would not be reasonable to process the 6,000 refund checks directly from WBBT’s accounts as Plaintiffs suggest. CP 8301-02. In any event, that is not the standard. *See, e.g., Baldus v. Bank of Cal.*, 12 Wn. App. 621, 633 (1975) (refusing to interfere with a trustee’s exercise of discretionary power, noting that “the trustee’s conduct is not to be judged from the vantage point of hindsight.”).

**3. Retention of Interest by MSC Is Also Permissible Because the Declaration of Trust and the Enrollment Agreements Expressly Authorize WBBT to Reimburse MSC for its Costs and to Pay for Administrative Support**

Plaintiffs argue that the agreements do not authorize MSC to retain interest, but they ignore provisions in the agreements expressly

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<sup>14</sup> The enrollment agreements define “the Trust” as WBBT. App. 5 (Ex. 2227) at 4 ¶ 3.

authorizing WBBT to pay MSC. App. 4 (Ex. 2027) (Declaration of Trust), Art. IV, § 9 (trustees have the power to “pay or provide for the payment from the Funds of all reasonable and necessary expenses in administering the affairs of the Trust”), *id.*, Art. IV §10 (requiring that the trustees “shall pay or provide for the payment from the Funds of all reasonable and necessary expenses of BIAW or any other entity in administering the retrospective rating program”); App. 5 (Ex. 2227) (Enrollment Agreement) at 4 ¶¶ 3, 4 (reiterating WBBT’s ability to pay for consultants and to pay for the costs of administering the retro program).

Despite these provisions, Plaintiffs argue that the practice of retaining interest as compensation or reimbursement is unlawful because the authorization for the practice is not reflected in other documents. Pls.’ Reply/Cross 24-26. The practice has existed, however, since the inception of WBBT and MSC and reflects the settlor’s intent. RP 9/15 62:2-66:22. Furthermore, trustees and MSC staff testified that they knew about the practice and considered it reasonable in light of the services MSC provided WBBT. CP 8283-84; CP 8293; RP 9/15 72:13-20; RP 9/13 152:4-8. Trustee Randy Gold testified:

It wouldn’t take a whole lot of investigation to realize that, with the quantity of work, the amount of work they [MSC] do, with all the calculations, the distributing of all the checks, the printing of all the checks and all the calculations and contact dealing that they have with all the beneficiaries, with phone calls, personal meetings with them and on and on, it wouldn’t take long to run up a bill well into the six figures. And I think the trust was getting a hell of a bargain here for a lot of years.

RP 9/14 95:25-96:13. The evidence of what a third party would have charged WBBT for even a fraction of the services MSC provided demonstrated that the value of the services far surpassed the amount of interest retained.<sup>15</sup>

The court's decision – that MSC's retention of interest was a breach of trust – elevates form over substance. There is no question that under the law (RCW 11.98.070(27)) and the agreements, the trustees have the authority to provide for the payment of MSC's services. Whether MSC retains the float interest or MSC sends the interest back to WBBT, invoices WBBT, and collects payment from WBBT does not matter. Ultimately, the result is the same. The money may be paid to MSC. It is not a breach of trust for MSC to retain the interest.

#### **4. The Amounts at Issue Are De Minimis and Do Not Give Rise to Fault**

Even if Plaintiffs could aggregate the interest for all of the thousands of other retro participants, the amount would still be de minimis and would not give rise to fault. The aggregated inbound interest at issue is 0.03% of the funds handled. Ex. 1485 at 5. The aggregated outbound interest is 0.26% of the funds disbursed. *Id.* at 7. That is \$2.08 per

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<sup>15</sup> CP 1684 ¶ 3 (table comparing interest retained by MSC to fees that trust services typically charge to provide trust administration services for a trust approximately the size of WBBT); *see also In re Trusts Created under the Will of Dwan*, 371 N.W.2d 641, 642–43 (Minn. Ct. App. 1985) (upholding trustee's deferred charge as reasonable, given that "most trust institutions in the area" charged a similar fee); *Mercer v. Merchants Nat'l Bank*, 298 A.2d 736, 737 (N.H. 1972) (upholding termination fee because it was consistent with "custom and practice"); *Est. of Taylor v. Taylor*, 85 Cal. Rptr. 474 (Cal. Ct. App. 1970) (upholding fee for trustee based on trustee's testimony that the "rate generally prevailed among banks in the Los Angeles area").

participant per year for inbound interest and \$11.91 per participant per year for outbound interest. Such de minimis amounts do not support a claim.<sup>16</sup>

Plaintiffs do not cite any cases holding that the de minimis rule does not apply in trust cases. Nor do they provide any reason why the rule should apply elsewhere but not in trust cases. The rule is regularly applied in trust and other fiduciary cases.<sup>17</sup>

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<sup>16</sup> See, e.g., *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946) *superseded by statute on other grounds as stated in Carter v. Panama Canal Co.*, 436 F.2d 1289, 1293 (D.C. Cir 1972) (when overtime claims of each member of proposed class concerned “only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded”); *In re Ambanc Le Mesa Ltd. P’ship*, 115 F.3d 650, 654-56 (9th Cir. 1997) (rejecting proposed contribution of \$32,000 per year, representing 0.5% of unsecured debt, “because it is de minimis as a matter of law”); *G.M. Sign, Inc. v. Stergo*, 681 F. Supp. 2d 929, 933 (N.D. Ill. 2009) (“Cumulative allegations of a putative class cannot be used to prop up an otherwise trivial claim that is unable to stand on its own.”); *Bay Area Props., Inc. v. Dutch Hous., Inc.*, 347 F. Supp. 2d 619, 624 (E.D. Wis. 2004) (plaintiff’s alleged investment in its relationship with defendant, constituting less than 0.5% of plaintiff’s annual revenues, would be disregarded as de minimis); *Druskin v. Answerthink, Inc.*, 299 F. Supp. 2d 1307, 1329 (S.D. Fla. 2004) (proxy’s failure to disclose \$1.75 million of revenue from related party transaction was de minimis when that revenue represented 0.67% of \$260.6 million total revenue); *TRW Vehicle Safety Sys., Inc. v. Santiso*, 980 So. 2d 1149, 1151-53 (Fla. App. 2008) (defendant’s sales in Florida in amounts up to \$2.94 million per year were de minimis as percentage of total sales); *In re Marriage of Alexander*, 857 N.E.2d 766, 776 (Ill. App. 2006) (error in valuation of investment account was de minimis in that it was less than 0.5% of total value of marital property); *Bd. of Trs. v. Mayor & City Council*, 562 A.2d 720, 734, 737 & n.36 (Md. 1989) (harm to pension plan beneficiaries caused by divestiture ordinance, approximately 0.05% of plan’s assets per year, was de minimis; “We recognize that, in absolute terms, the costs of divestiture may be large. . . . [H]owever, the costs are de minimis when viewed in relation to the systems’ total assets.”); *HSAM, Inc. v. Gatter*, 814 S.W.2d 887, 892 (Tex. App. 1991) (plaintiffs could not rely upon the fact that same charge “multiplied by the thousands of contracts which lenders such as HAS service is not necessarily a de minimis amount”).

<sup>17</sup> For examples of trust cases applying the rule, see, e.g., *Bd. of Trs. v. Mayor of Balt.*, 562 A.2d 720, 738 (Md. 1989) (de minimis cost of trustees’ avoidance of investments in companies doing business in South Africa would not breach duty of loyalty to beneficiaries); *In re Morgan Guar. Trust Co.*, 396 N.Y.S.2d 781, 787 (Sur. Ct. 1977) (trustee was not required to pay withdrawn trusts the amounts that had been earned by the trusts but were not distributed to them, given “the fact that the loss to the withdrawn trusts is de minimis”); *In re Guasti’s Estate*, 256 P.2d 629, 633 (Cal. Ct. App. 1953) (trustee’s charge of excessive fee would be disregarded where the amount in issue was de minimis); *Weber v. Jefferson Cnty.*, 166 P.2d 476, 478 (Or. 1946) (on accounting for constructive trust in favor of county against defendants who fraudulently procured real estate from the county, trial court’s error in giving defendants credit for the amount of the

## 5. Plaintiffs Cannot Overcome the De Minimis Rule by Seeking Relief on Behalf of Others

Plaintiffs seek to avoid the de minimis rule by trying to aggregate the tiny amounts allegedly due to all participants. As just noted, even aggregated, the amounts are de minimis in light of the magnitude and number of transactions at issue. In addition, Plaintiffs have no standing to pursue those damages on behalf of others. They disclaimed any damages, CL 8; RP 9/13 14:4-7; RP 9/14 161:10-13, and expressly abandoned their class allegations, CP 9416-17. Plaintiffs now argue they may pursue the damages claims of others by seeking an *equitable* order that the trustees restore monies to the trust that should be part of the trust corpus. But in this case, even if that is what Plaintiffs sought, that is still pursuit of a damages award on behalf of others, something they cannot do.

The only monetary relief available on the claim that MSC failed to pay interest is an award of damages to the individual participants, in the amount of the interest that MSC earned on the refunds allocable to each of them.<sup>18</sup> Under the court's summary judgment ruling, "the employers are

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recording fee would be disregarded because the amount was de minimis); *Bryan v. Sec. Trust Co.*, 176 S.W.2d 104, 106 (Ky. Ct. App. 1943) (court would ignore claims seeking de minimis damages that were brought by beneficiaries against trustees who allegedly engaged in self-dealing, made secret profits, and made imprudent investments). *See also*, e.g., *Dolezal v. Plastic & Reconstructive Surgery*, 640 N.E.2d 1359, 1369 (Ill. App. Ct. 1994) (refusing to award damages to employer medical practice for breach of fiduciary duty by employee physician who diverted patients to his separate practice where the gain to the physician from the breach was de minimis); *Sherwood B. Korssjoen, Inc. v. Heiman*, 52 Wn. App. 843, 850 (1988) (awarding real estate broker commission despite de minimis breach of fiduciary duty); *Finkelstein v. Finkelstein*, 502 A.2d 350, 353-54 (R.I. 1985) (trustees' failure to provide annual accounting was de minimis breach that would not support a claim by beneficiary when the cost of providing the accounting would have outweighed the benefit).

<sup>18</sup> Plaintiffs themselves have repeatedly characterized their inbound and outbound interest claims as damages claims of the individual employer participants. In Paragraph 31 of

the settlors and own the premium refunds at all times after the refunds are issued, subject to the terms of the enrollment agreement.” CP 5012.

Seeking restoration to the trust pursues the same result. *WBBT is a pass-through entity*: except for the marketing assistance fees, WBBT pays out to the employer participants all of the refunds and earnings. An order requiring restoration of interest to the trust, would simply result in those funds being passed back through to each former participant, each in an amount different for each participant. Thus, reimbursement based on the inbound and outbound interest is in reality a damage claim of each individual employer participant, not the restoration of property to a trust, as Plaintiffs argue.

In Washington, courts recognize this “distinction between cases where the plaintiff seeks an immediate recovery for himself, as distinguished from those cases where a beneficiary of a trust sues the trustee in order to restore funds to the trust.” *Kelly v. Foster*, 62 Wn. App. 150, 154 (1991) (citing *Allard v. Pac. Nat’l Bank*, 99 Wn.2d 394, 400 (1983)). A suit to restore funds to the trust is an equitable action, whereas

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their Second Amended Petition, they allege that the practice of retaining the float benefitted MSC “at the expense of the ROII Beneficiaries,” not at the expense of the Trust. CP 1024. In Petitioners’ First Motion for Partial Summary Judgment, Plaintiffs introduce their argument on the interest issue with the statement that “the *trust beneficiaries* are entitled to any interest earned on the Trust.” CP 1564 (emphasis added). They state that “[a]ny interest that accrues on principal funds of a trust attaches as property to the underlying principal and thus *belongs to the principal owner*.” *Id.* (emphasis added). Plaintiffs then argue that both the enrollment agreements and the 1994 Declaration of Trust “explicitly and unambiguously entitled *the employer beneficiaries* to all interest.” CP 1566 (emphasis added). Plaintiffs, in the motion, then argue that both the 1994 DOT and the enrollment agreements acknowledge that “the employers are entitled to interest.” CP 1567.

a suit in which beneficiaries seek recovery for themselves is legal in nature. *Allard*, 99 Wn.2d 400-01; *see also* 4 AUSTIN SCOTT., ET AL., SCOTT & ASCHER ON TRUSTS § 24.2.1, at 1660 (5th ed.) (a beneficiary may bring an action at law against a trustee who is under an immediate and unconditional obligation to pay money to the beneficiary).

In *Allard*, the life income beneficiaries of a trust sought to return real property, which was sold for less than its fair market value, to the trust. *Allard*, 99 Wn.2d 395-96, 401. Because the life income beneficiaries did not have a claim to any trust property other than their annual income, their claim for “restoration of the value of the corpus” was equitable. *Id.* at 400-01. In *Kelly*, the sole trust beneficiary also challenged the sale of real property that was sold for less than its fair market value. *Kelly*, 62 Wn. App. 151-52. But because the sole trust beneficiary sought to recover funds that were immediately payable to her, the action was legal in nature. *Id.* at 154-55. The only difference between the beneficiaries in *Allard* and *Kelly* was whether the trust or the individual would ultimately recover damages from the suit. Here, as in *Kelly*, any recovery would ultimately be by the participants, not the trust.

Plaintiffs cannot escape the fact that what they seek is an award of damages to the 6,000 retro participants, but Plaintiffs never tried to satisfy the due process and other requirements of CR 23. Instead, they expressly abandoned their damages and class claims. Each individual damage claim is subject to different proof and defenses. Equally important, each

employer participant has the right to determine that it does not wish to pursue any damage claim. A significant number of employer participants are in this camp.<sup>19</sup> Similarly, a number of employer participants have served on the board of BIAW or as trustees of WBBT and consented to the practices Plaintiffs challenge. All of these issues would have to be litigated in response to individual damages claims. Plaintiffs cannot resurrect their class damages claims, and avoid these due process problems, by re-labeling them as a claim for equitable restoration.

**D. State Defendants Acted in Good Faith and Are Entitled to the Protections of the Exculpatory Provisions**

Plaintiffs argue that exculpatory provisions may not relieve trustees of the duty to act in good faith and with honest judgment. Pls.’ Reply/Cross Br. 44; *see* RCW 11.97.010 (provisions of trust may relieve trustees from duties and liabilities so long as trustees “act in good faith and with honest judgment”). But Plaintiffs do not cite to any evidence of bad faith. There was none. Nor do Plaintiffs dispute the long list of findings of fact confirming the good faith of the State Defendants (*e.g.*, FF 17, 37, 39, 42, 50, 54, and 57). The only evidence is that State Defendants acted in good faith with honest judgment in the best interest of participants. *E.g.*, CP 8284-85 at ¶¶ 10-11; CP 8290 at ¶ 11; CP 8299-90 at ¶ 10; RP 9/14 135:3-136:13; RP 9/15 59:5-62:1; RP 9/16 21:6-22:1,

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<sup>19</sup> Eight employer beneficiaries joined this lawsuit expressly objecting to Plaintiffs’ claims, *see* CP 8263-8267, and scores of others submitted declarations opposing Plaintiffs’ relief. CP 9079-9409 (declarations of 74 BIAW retro program participants opposed to plaintiffs’ claims, relief sought and representation).

23:14-24:8, 110:10-112:19. State Defendants are entitled to the protection of the exculpatory provisions.

Plaintiffs also argue that exculpatory provisions may not protect trustees from disgorging profits taken in breach of trust. Pls.' Reply/Cross Br. 44. But the trustees in this case did not take any profit. The seven trustees are volunteers. They are not paid. They did not steal anything. They did not receive the interest float, MSC did. *E.g.*, CP 8281-85; CP 8293; CP 8287-90; RP 9/15 59:18-61:13; RP 9/16 16:21-6-22:1; FF 3, 35, 47. Plaintiffs' argument has no bearing on whether the trustees, who did not profit, are entitled to the protection of exculpatory provisions.

**E. The Trial Court Erred in Failing to Distinguish the Different Roles of the State Defendants when Assigning Liability**

The trial court's conclusions of law group all State Defendants together to assign fault for breaches they did not commit. Plaintiffs argue that State Defendants have not assigned error to any of the findings that support the trial court's conclusions. Pls.' Reply/Cross Br. 45. That is exactly the point. There are no findings supporting the conclusions that all State Defendants are responsible for the technical breaches identified by the court. The findings properly distinguish between the acts and roles of the various parties but the conclusions of law do not.<sup>20</sup>

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<sup>20</sup> *E.g.*, Compare FF 35 ("The inbound interest retained by BIAW-MSC . . . ) with CL 3 ("The defendants violated their duties under the trust when they retained interest from the period of time between when the Department of Labor and Industries transferred funds to BIAW and before the funds were transferred to the WBBT investment accounts.") and FF 47 ("The parties stipulated that BIAW-MSC retained all of this interest, referred to as the 'outbound' float interest.") with CL 3 ("The defendants violated their duties under the trust when they retained interest earned from the period of time . . . that has been considered outbound interest.").

Plaintiffs also argue that BIAW is responsible for the other parties' breaches, yet nothing in the findings of fact indicate that BIAW did anything wrong. The findings indicate that MSC retained interest and WBBT failed to conduct an accounting. There is no finding indicating that BIAW played any role in those technical breaches. The court distinguished between parties in its findings of fact and erred by not doing so in its conclusions of law.

**F. The Trial Court Erred in Failing to Award State Defendants their Attorneys' Fees and Costs**

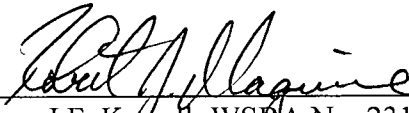
Plaintiffs argue that the enrollment agreement attorneys' fees provision does not apply because "Defendants were not enforcing any contractual obligations" owed by Plaintiffs. State Defendants, however, won the right to enforce many contractual obligations under the enrollment agreements, including most notably Plaintiffs' obligation to pay the MAF in full. App. 5 (Ex. 2227) at 4 ¶ 4(b). Successfully enforcing this payment obligation triggers the attorneys' fees provision under the plain language of the enrollment agreement. *See* App. 5 (Ex. 2227) at 5 ¶ 9. For the reasons set forth in State Defendants' initial brief and the brief submitted by Master Builders Association of King and Snohomish Counties, the enrollment agreements and the trust statute compel a fee award to State Defendants.<sup>21</sup>

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<sup>21</sup> Plaintiffs' suggestion that they might be entitled to fees, pursuant to the attorneys' fees provision of the enrollment agreement, Pls. Reply/Cross Br. at 48 n.26, comes far too late: Plaintiffs neither made this argument below, nor in their opening brief.

RESPECTFULLY SUBMITTED this 2nd day of April, 2012.

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### CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On April 2, 2012, I caused to be served in the manner noted below a copy of the document entitled **REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS BIAW, BIAW-MSA, WBBT AND INDIVIDUAL WBBT TRUSTEES** via the means indicated below on the following:

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**Original and one copy**

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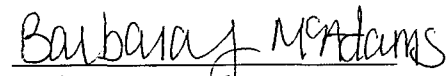
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I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

Executed this 2nd day of April, 2012, in Seattle, Washington.

  
Barbara J. McAdams